IN THE CLAIMS COMMISSION OF THE STATE OF TENNESSEE
EASTERN DIVISION

RAY BELL CONSTRUCTION COMPANY, INC.,

Claimant,

v.

STATE OF TENNESSEE,

Defendant.

Claim No. 20071215
Regular Docket

DECISION

THIS CAUSE CAME ON to be heard before the undersigned sitting in Nashville, Tennessee, on October 27-30, 2008, upon the Complaint filed by the Claimant, the Answer thereto filed by the Defendant State, the stipulations entered into by the parties and announced at the time of the trial, the testimony of live witnesses, as well as opening and closing arguments presented by both parties, and the Record as a whole.

The Claimant was represented by Gregory L. Cashion, Esq. and Matthew J. DeVries, Esq., of the Davidson County Bar. The State of Tennessee was represented by Melissa Moreau, Esq. and David Coenen, Esq., of the Office of the Attorney General of the State of Tennessee.

Overview of Case.

This case involves a major road construction project in Memphis, Tennessee. The planning stages for this project began in the late 1960's and at one point involved a case which resulted in an important United States Supreme Court decision.[1]

[1] See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 91 S.Ct. 814, 28 L. Ed 136 (1971).

The State of Tennessee through its Department of Transportation ("TDOT") and the Federal Highway Administration ("FHWA") were anxious to complete the project since the interchange portion of the work had been the site of a horrific accident, which resulted in the deaths of seven individuals, when a propane tanker truck overturned, went airborne, and exploded as it was traveling north on Interstate 40 in mid-town Memphis.

The project itself involved extensive work and an original contract price in excess of fifty-three million dollars ($53,000,000.00). The work covered by the contract involved the destruction of several pre-existing bridges and the replacement of several more. Also involved were construction of retaining walls and bridge abutments and, of course, a significant amount of the usual roadway paving and landscaping.

The work was projected to take twelve hundred seventy-seven (1,277) days to complete and a primary goal of TDOT was to finish the construction expeditiously while minimizing inconvenience to the motoring public.

The project was a joint effort between TDOT and FHWA with FHWA providing ninety percent (90%) of the funding. However, the actual work was overseen by TDOT in consultation with FHWA officials in Nashville, Tennessee. TDOT retained the services of a prominent engineering firm, Allen and Hoshall ("A&H"), to oversee the work carried out by the prime contractor and its numerous subcontractors. In order to incentivize the successful bidder-contractor to timely complete the anticipated work and possibly complete the job ahead of schedule, a special provision (referred to throughout these proceedings as SP 108(B)) was included in the contract, providing that the contractor would be paid a bonus of ten thousand dollars ($10,000.00) per day, with a maximum of two million five hundred thousand dollars ($2,500,000.00), for every day the work was finished in advance of the anticipated completion date of December 15, 2006. On the other hand, SP 108(B) also provided that for every day after

December 15, 2006, the "work in the original contract [was] not completed" a disincentive of ten thousand dollars ($10,000.00) per day would be assessed against the Claimant with no limitation on the amount. SP 108(B) also provided for liquidated damages independent of and additive to the disincentive should the work not be completed by the originally anticipated date.

The fourth paragraph of SP 108(B) read as follows:

> The December 15, 2006, completion date may be extended in accordance with the Standard Specifications, however, no incentive payment will be made if work is not completed in its entirety by December 15, 2006.

The Claimant contends the proof shows that this provision was implemented by TDOT and FHWA during the 1990's and had been used for some fifteen (15) years on major projects.

The contract between Ray Bell Construction Company ("RBCC") and TDOT was signed by RBCC on May 21, 2003, and by the State on May 28, 2003, with an effective date of June 18, 2003. As stated above, the scope of the project was quite large.

RBCC is headquartered in Brentwood, Tennessee, and is a major contractor, which at the time of this project was carrying out some ten (10) to twenty (20) projects for TDOT. TDOT is a major customer of RBCC, and RBCC has been doing work for the State for many years.

The instant dispute arose because of the refusal of TDOT to extend the December 15, 2006, completion date so that RBCC would qualify for the ten thousand dollar ($10,000.00) per day bonus provided for in SP 108(B) and avoid the ten thousand dollar ($10,000.00) per day disincentive for untimely completion of the project as well as liquidated damages.

RBCC's position in this litigation is that it was unable to complete all of the work by December 15, 2006, because of unanticipated problems which developed with the placement of caissons (or bridge supports) near bridges located near North Parkway and Faxon Avenue, as well as an additional problem with an easement over project tract 163. The problem at the

bridges occurred because the driving of caissons into the ground for the bridges posed a vibratory threat to the structural integrity of a historic church located on the west side of Interstate 40. The easement problem at tract 163 surfaced because a homeowner had constructed a patio deck on his property after the right-of-way acquisition process had been completed.[2]

RBCC claims that because of these delays at least one hundred thirty-seven (137) days, agreed to by TDOT for disincentive purposes (See SA 24, EX 24), also should be tacked onto the originally anticipated December 15, 2006, completion date for purposes of earning the incentive.

Additionally, it is the Claimant's position that because it was required to complete twenty percent (20%) more work based on additional quantities of components used to complete that work, an additional one hundred seventy-seven (177) days should be tacked onto the originally anticipated completion date as authorized by Standard Specification 108.06 for incentive earning purposes. (See EX 7.)

Because of these two considerations, RBCC submitted a request for an extension of the December 15, 2006, incentive date of three hundred eight (308) days which would qualify it for the maximum two million five hundred thousand dollar ($2,500,000.00) incentive or bonus.

On the other hand, the State counters RBCC's position by arguing that the language of SP 108(B) is extremely clear, and that only the disincentive date but not the incentive date can be extended. Additionally, the State vigorously contends that any evidence of the extension of the incentive completion date on other projects is not admissible here since to consider the same would violate the parol evidence rule, constitute hearsay, and is not relevant to the instant proceedings.

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[2] There is some confusion as to whether this tract is numbered 163 or 1163 since both numbers were used by witnesses and found in documents in this case. However, there is only one tract involved with this issue and readers of this opinion should not be confused by this numbering snafu.

The State also argues that the problems encountered with the caissons at the North Parkway and Faxon Avenue bridges did not slow completion of the project in its entirety since RBCC was freed up to utilize its resources on other aspects of the work while the problems there were resolved.

The State also questions the inclusion of certain items as additional costs/quantities used in computing the pro-rata number of days which it concedes could be used to validly extend the December 15, 2006, disincentive and liquidated damage date.

As stated above, the State agreed to an extension of the contract completion date, per SA 24, but only for disincentive purposes, by one hundred thirty-seven (137) days based on the delays caused by the bridge caissons and the easement at tract 163. RBCC refused to sign SA 24 since it contained language making it clear that it applied only to disincentives and not incentives.

To date, the State has assessed a disincentive penalty of one hundred seventy thousand dollars ($170,000.00) since it contends the roads on the project were not open to unobstructed traffic until December 17, 2006, and that additional paving work was necessary to correct certain rideability issues up through November of 2007. Additionally, the State has assessed RBCC twenty-three thousand eight hundred dollars ($23,800.00) as liquidated damages, in addition to the disincentive, because of these same considerations.

Witnesses.

In understanding this case, it is helpful to know something about the various witnesses.

Bruce Nicely was RBCC's representative at trial. His current position with RBCC is Senior Vice President in the Transportation Division. He is an architectural engineer licensed in Tennessee since 1978. Mr. Nicely has been employed by RBCC since 1990. He has worked in Tennessee since the late 1970's after graduating in architectural engineering from Pennsylvania

State University. Mr. Nicely was in constant contact with various TDOT officials throughout the life of this project and was primarily responsible for dealing with the payment issues which have resulted in this litigation.

Several witnesses for RBCC are former employees of TDOT. On this project, the primary manager for RBCC was Fred Clayton. He has been with RBCC since 2000. Mr. Clayton is also a graduate engineer from Tennessee Tech who worked for TDOT for seventeen (17) years. His highest position with TDOT was as an Assistant Regional Construction Engineer.

Testifying for the State was Paul Degges, a long-time employee of TDOT, who shortly after the letting of this contract in the spring of 2003, became Assistant to the Chief Engineer in the summer of that same year. Later, in April of 2004, Mr. Degges became TDOT's Chief Engineer, a position he still holds. Mr. Degges is a graduate engineer from Tennessee Technology University.

Brian Egan is an engineering graduate of the University of Rhode Island who became involved in this project in April of 2005. He is currently TDOT's Director of Construction. Mr. Egan was involved in the preparation of SA 24 referred to above. Prior to working for TDOT, he worked for FHWA for ten (10) years. He joined TDOT in 2000. When he became involved in the project in April of 2005, he assisted then Director of Construction, David Donoho, as the issues dealt with here arose. (TR 711.)

David Donoho worked for TDOT for twenty-eight (28) years and was Director of Construction during this project. Mr. Donoho graduated from the University of Tennessee in engineering and left TDOT on June 30, 2008, to take a position in private industry. He likewise was involved in the drafting of Trial Exhibit 20 for Mr. Degges' signature.

James S. Klenk is also a graduate engineer employed by the A&H engineering firm in Memphis. A&H provided primary consulting engineering services to the State and oversaw the work on this project. Mr. Klenk has been involved with the planning and execution of this project since 1988.

Mr. Scottie Plunk, who did not testify, was identified during these proceedings as TDOT's Regional Construction Engineer in the Memphis region at the time of this project.

Finally, Mr. Victor Weddle, a graduate engineer from the University of Memphis, was an Operations Specialist III in the Memphis area at the time of the project. One of his functions in that job was oversight of FHWA projects.

Facts.

The trial of this matter occurred over a four day period and resulted in several volumes of testimony.[3]

The evidence is clear that completion of this project would replace a completely dysfunctional interchange at the confluence of Interstates I-40 and I-240 in Midtown Memphis. In fact, at one point seven people were killed in a propane tanker accident at this site. (TR 590.) The project itself involved the demolition of existing bridges, construction of seven new bridges, twenty-two (22) retaining walls, twelve (12) noise barriers, and associated paving. Ninety percent (90%) of the funding for the project was provided by the Federal Government which also had some hand in the day-to-day oversight of the project. (TR 321.) The initial projected cost of the project was fifty-two million eight hundred eighty-two thousand three hundred fifty-one and 76/100 dollars ($52,882,351.76) with an anticipated completion date of December 15, 2006. (TR 83.) From start to finish, the work on the project was estimated to take one thousand two

[3] References to the Trial Transcript and joint Exhibits introduced at trial will be as follows: (TR __and EX __). The trial took place over four days, resulting in seven (7) volumes of testimony. There are numerous joint exhibits, marked as just noted. The State introduced additional exhibits which are marked as R ___.

hundred seventy-seven (1,277) days to complete. (TR 103.) TDOT signed the contract on May 28, 2003, and RBCC could begin work on June 18, 2003. (TR 85.) Section 105.06 of the Standard Contract Specifications provided for RBCC to develop schedules for completion of various stages of the work. (TR 787-788; see also EX 6.) Mr. Clayton testified that critical items on these charts are activities which must be completed before other work could begin. These benchmarks were set out by RBCC through the end of the project. (TR 427.)

However, Mr. Clayton testified that under this contract, there was no requirement that something known as the Critical Path Method ("CPM") be utilized. Mr. Klenk and Mr. Egan also agreed that there was no requirement for use of a CPM on this project. (TR 639, 787.) Mr. Clayton stated that TDOT never requested of him a critical path analysis on this project. (TR 177.)

On projects begun after February of 2005, Mr. Donoho testified that a CPM analysis is required if the contract calls for it. Additionally, after that date, if there is an incentive clause in a contract, utilization of a CPM is required. (TR 246.) Mr. Donoho confirmed that if there is a CPM requirement in a contract now, there will be no extensions of the completion dates utilizing the pro-rata method set out in Standard Specification 108.06.

Mr. Klenk acknowledged that if a contractor had a simple schedule setting out the order of how it was going to move through a project, it would work first on critical items in a sequence. He went on to testify that simply because a contractor was able to work on one part of an improvement which was not critical did not necessarily mean it was advancing the work, and that potentially if the contractor identified work in a critical area it could not perform at a scheduled time, then this could delay the project as a whole. (TR 640.) However, Mr. Egan testified that when he reviewed activities occurring during the delays complained of by the Claimant, some work items started during that delay which were critical and which were

supposed to have begun earlier, appeared to continue during the delay. He concluded that with this consideration in mind, he could not say that the contractor was delayed on overall completion of the project. (TR 813.)

The current version of "Standard Specification 108.06-Determination of Time for Completion" provides that "If the contract requires [the use of] a mandatory Critical Path Method (CPM), the Engineer may not proportionately increase the working time" (EX 8). This version of 108.06 came into effect after the contract on this project was let.

According to Mr. Egan's testimony, the Commissioner's [of TDOT] designees on this project would be Project Supervisor John Smith and also Mr. Klenk with A&H who coordinated with TDOT and RBCC. These individuals would be referred to as "the Engineer" under the contract. (TR 743, 497.)

At the time this project was being carried out, RBCC was doing an above average amount of work for TDOT and had some ten (10) to twenty (20) projects underway on behalf of the State. (TR 538.) Weekly meetings between TDOT and RBCC were held at the contractor's offices. (TR 75.)

However, Mr. Klenk testified that FHWA officials dealt almost exclusively with TDOT rather than with him on the project. (TR 617.)

The contract at issue in this case also includes an order of preference or precedence clause applicable to the contract which provides that Supplemental Specifications control over the 1995 Standard Specifications; that contract plans govern over both Supplemental and Standard Specifications, and that Special Provisions control over both contract plans and specifications. (TR 255, 859, and EX 2, p. 7, paragraph 2.)

"Standard Specification 108.06-Determiniation of Time for Completion," in paragraph 4, provides for a possible extension of time for completion of the project when greater quantities of

work are done by a contractor, while paragraph 5 of that same section provides for more time where delays out of the contractor's hands occur. (TR 123-124 and EX 7.)

The bidding process required bidders to assess between four and five hundred items and perform computations based on pay estimates and also incorporating subcontractor's bids in formulating a bid proposal. (TR 468.)

Mr. Degges testified that Standard Specification 108.06 acknowledged the fact that projects are bid initially on estimated quantities while payments are based on actual quantities and that the Engineer, in light of those figures, must determine whether or not there was an impact on the schedule. (TR 917.)

The proof is clear that in a large part TDOT contracts are fairly standard and consistent. (TR 472-473.)

Mr. Egan testified that in the late 1980's and early 1990's, FHWA began utilizing innovative practices in order to get jobs completed and roads opened. Currently, those practices involve no excuse bonuses and A+B bidding. (TR 850.)

Mr. Egan also testified that SP 108(B) is a unique provision included in only a few select contracts and that of that set of contracts, an even smaller number – 1 to 2% maximum – contain the particular incentive/disincentive clause involved in this litigation. He further testified that SP 108(B), using the precedence clause found in the standard contract, is at the top of the hierarchy in terms of interpreting the contract. (TR 713.) Mr. Degges testified that if a project was going to involve severe impacts on the motoring public and the community, this sort of incentive/disincentive was included. (TR 885.) According to him, these provisions were used to encourage a contractor to overcome obstacles encountered and to deliver a project ahead of schedule. (TR 894, 910.)

Mr. Degges also indicated that FHWA asked TDOT to keep the amount of the incentives at typically less than ten percent (10%) of the bid proposal. (TR 893.) If a contractor encountered cost over-runs, it also was to be paid for those over-runs. (TR 347.) Mr. Degges estimated that less than five percent (5%) of state contracts contain an incentive. (TR 891, 964.) SP 108(B) in this contract required that all work "in the original contract" had to be completed before December 15, 2006, and that RBCC would not receive the ten thousand dollar ($10,000.00) per day early completion incentive "if [the] work is not completed in its entirety by December 15, 2006" (EX 1).

In order for the Claimant to receive the maximum two million five hundred thousand dollar ($2,500,000.00) incentive bonus based on an original completion date of December 15, 2006, it would have had to have completed the work under the contract terms, by April 9, 2006. (TR 388.)

Typically, these sorts of incentives/disincentives are not used on smaller projects and the ten thousand dollar ($10,000.00) per day incentive used here would have been one of the larger incentives utilized in Tennessee at the time. (TR 234.) Mr. Klenk testified that within the first three to four months of the work on this project, in connection with supplemental agreements developed in connection with building noise walls, he discussed with Regional Construction Engineer Plunk that there was no provision under SP 108(B) for extending the date by which a contractor could obtain an incentive. (TR 688.)

RBCC contended that even though it was delayed by at least some one hundred thirty-seven (137) days by the problems with the two bridges and the right-of-way easement, as well as additionally by the addition of approximately twenty percent (20%) more work on the job (in terms of dollar amounts), it still managed to complete all of the work by December 17, 2006, and that the roadways were open to free and unobstructed traffic flow by that date. (TR 357.)

Mr. Nicely testified that being able to complete a job early and get a bonus is a significant factor in the bidding process. (TR 468.) Mr. Clayton testified that before the delays at the church and on tract 163 came up, RBCC was sure it would complete the project by April 9, 2006. (TR 456.) However, the State argued that the Claimant's own six schedules all indicated that the project would be completed after April 9, 2006. (R 3.) However, these schedules developed at the start of the project, do not factor in any over-runs or under-runs experienced during the work.

Extension of time for completion of the work is provided for in Standard Specification 108.06 which states that if fulfillment of the contract requires work in greater quantities, the contract time "shall" be increased "on a basis commensurate with the amount and difficulty of the added work". (TR 247-248 and EX 7.) The section goes on to provide that if these requirements are met the extended completion date shall be in full force and effect the same as if it was in the original contract. (TR 249.)

Over-runs in quantities refer to using more of a quantity than was originally set out in the bid. Quantity estimates used in the bidding process were prepared by TDOT and A&H. (TR 105-106.)

Mr. Nicely testified that using the pro-rata method, he took into account five hundred sixty-two (562) line items completed over one thousand two hundred seventy-seven (1,277) days and derived a daily pro-rata dollar amount of work of forty-one thousand four hundred eleven dollars ($41,411.00). (TR 449-450.) Then, he testified he divided the overrun figure of six million two hundred ninety-two thousand five hundred seventy-eight dollars ($6,292,578.00) by

forty-one thousand four hundred eleven dollars ($41,411.00), yielding an additional two hundred fifty-two (252) days of over-runs pursuant to Standard Specification 108.06.[4] (TR 174, 501.)

The parties agreed that the majority of the over-runs on this project were caused by poor soil conditions at the project site and the consequent effects on preparation of the surface for paving and the paving itself. According to Mr. Klenk, these over-runs resulted in additional costs of approximately four million dollars ($4,000,000.00) and may have warranted time extensions under the contract. (TR 105, 634.)

Mr. Donoho testified that pro-rata adjustments under Standard Specification 108.06 had been used in the past and allowed TDOT to make adjustments "based on over-runs and contract quantities" (TR 239 and EXS 20 and 20A). According to Mr. Donoho, computing pro-rata adjustments was a simple process and saved time and expense. (TR 681.) Since a CPM was not required under this contract, it was not necessary to use that method in establishing over-runs. (TR 241.) Mr. Egan testified that in the pro-rata discussions and analysis which occurred in this case, he, under the contract, was the "Engineer". (TR 826.)

RBCC refused to sign SA 24 since it did not change the incentive date. It was RBCC's position that there was nothing in SP 108(B) which prohibited extending the incentive date. (R 145, EX 94.) Further, it is RBCC's position that Standard Specification 108.06 (Exhibit 7) makes extension of the completion date mandatory if "greater quantities than those set forth in the proposal" and the time requested are "commensurate with the amount and difficulty of the added work" (TR 495 and EX 7). The State's response to this contention is that Special Provision 108(B) trumps Standard Specification 108.06 under the order of preference provision

[4] There seems to be some difference between the methods used by Mr. Nicely and Mr. Clayton to compute pro-rata days. Mr. Clayton testified that his method was to take the total contract amount paid to date, subtract from that any adjustments that had been paid, and then divide that number into the original bid amount to obtain a percentage of overrun. Subsequently, that percentage figure is multiplied times the number of days that originally were allotted, which yields a number of days for the pro-rata overrun. (TR 122.)

found in the contract. (TR 719.) Further, Mr. Egan testified that it is not the contractor who can prove the merit of a request for added time but rather the Engineer, in this case him, who makes any determination regarding such adjustments. (TR 826.) Mr. Egan also opined that a pro-rata analysis is a bad form of analysis and not valid. (TR 838.)

Mr. Clayton testified that RBCC's position was that SA 24 should be approved for one hundred thirty-seven (137) additional incentive days for unexpected delays on the project and one hundred ninety-one (191) incentive days for additional quantities of work done under Standard Specification 108.06. RBCC was willing to deduct twenty (20) days because of concurrency between the one hundred thirty-seven (137) delay days and the one hundred ninety-one (191) pro-rata days. The total requested days then would be three hundred eight (308), which would extend the completion date from December 15, 2006, to October 19, 2007. (EX 96.)

RBCC points out that the original contract work contemplated by SP 108(B) did not include the twenty percent (20%) quantity over-runs. (TR 458.) Mr. Nicely testified that SP 108(B) addresses only "all work in the original contract", and that he does not consider such extra work when preparing his bid. He also testified that previously he had never had a problem getting time extensions for performing extra work. (TR 475.) Mr. Nicely testified that initially the anticipated profit on the Mid-Town project was three million dollars ($3,000,000.00) but that eventually RBCC's profit of four million eight hundred ninety-three thousand ninety-one dollars ($4,893,091.00) was accounted for by the fact that it performed additional quantities of work, turned a profit on approved supplemental agreements, and because of unexpected repair work done on an unrelated bridge west of Memphis for which RBCC was hired on an emergency basis. (TR 537, 570.) Mr. Nicely also testified that RBCC had been paid for additional quantities of work performed but not the SP 108(B) incentive.

There were two major delays on this project. One involved the Faxon Avenue and East Parkway bridges over I-40. That problem developed because pile driving for caissons for the new bridges was causing seismic vibrations which it was feared would damage a historic church. (TR 392, 422.) RBCC contended the delay encompassed February 6, 2004, to July 7, 2004.[5] (TR 422.) Mr. Clayton also felt that these delays caused additional quantities of work to be performed. (TR 453-454.)

The second delay involved an easement. The easement issue at tract 163 became critically important as the Jackson Avenue Bridge neared completion and the retaining wall over tract 163 had to be built. RBCC requested a one hundred eighty (180) day extension because of this problem but was granted only thirty (30) additional days. (TR 485.)

On February 24, 2005, Chief Engineer Degges wrote Tennessee FHWA Administrator, Bobby Blackmon. The subject of the letter was a policy which had been added to TDOT contracts some fifteen (15) years before on June 25, 1990. The subject language was contained in Standard Specification 108.06 and read as follows:

> If the Engineer determines that an increase in the contract working time proportionate to the value of the increase in quantities is commensurate with the amount and difficulty of the added work and a written request to extend time as provided below has not been made, he may proportionately increase the contract working time.

This is the pro-rata concept discussed above. The letter goes on to state that the pro-rata approach was approved by FHWA and was included in all TDOT contracts. According to the letter, the use of this language had saved both TDOT and FHWA time and expense. However, the letter noted, the pro-rata approach had been determined to conflict with FHWA procedures

[5] At another point in the testimony, Mr. Clayton testified that the delay on the bridge work covered January 4, 2004, to June 4, 2004. The exact dates are inconsequential since the parties apparently agreed to a delay of one hundred thirty-seven days. However, the State, of course, contended that that extension applied only to assessment of disincentives. (See TR 392.)

and should therefore not be used for calculating additional time where completion is a major factor.

Page 2 of the letter states that going forward the pro-rata approach should be discarded. However, "in fairness to both the department and its agents" Mr. Degges contends that the provision should continue to be applied to existing contracts. Accordingly, TDOT requested FHWA's concurrence in continuing to apply the pro-rata language to "existing contracts" and Degges attached a list of ten (10) such projects to his letter. The letter goes on to state that in the future alternative contracting methods will be used in the department's attempt to minimize disruption and inconvenience to motorists. The letter states that "beginning with the February 25 letting" TDOT would "no longer consider paying incentives" on projects not complete by the original contract completion date. (EXHS 20 and 20A.)

The Shelby County Memphis Mid-Town project was an existing contract which contained the same 108.06 pro-rata language. For some reason, it was not included on the attachment list to Mr. Degges' letter. However, another large project RBCC was involved with - the Robertson Road/Briley Parkway project in Davidson County, entered into on October 1, 2002, with a seven thousand five hundred dollar ($7,500.00) per day incentive bonus - was listed. (See EXS 20 and 20A.) According to Mr. Degges, Mr. Donoho put together the original draft of the letter to Mr. Blackmon. (TR 927.) Mr. Degges testified that Mr. Donoho provided him with the list of projects attached to his letter. (TR 934.) In turn, Mr. Donoho testified his assistants provided to him "a list of active contracts with incentive dates" (TR 351). Mr. Degges had no idea why the Shelby County project was omitted from the list of existing contracts. (TR 936.) Of the ten (10) contracts listed on the attachment to the letter, five contained the identical language found in the contract involved in this case. (TR 289-293.) Further, Mr. Donoho likewise knew of no reason why this project should not be on the list. (TR 244-245.) Mr. Egan,

Mr. Donoho's subordinate at the time, also assisted him in drafting the letter for Mr. Degges' signature. He too does not know why the Shelby County project was not on the list, but testified he overheard Mr. Donoho say the omission was an oversight. (TR 821.) Further, Mr. Egan did not disagree with Mr. Donoho's statement that if the Memphis project had have been on the list, a pro-rata extension would have been granted. Mr. Blackmon and Mr. Degges agreed that any contract in existence prior to February and March of 2005 would be handled consistently with past practice and paid. (TR 847.) Mr. Donoho also testified the omission of this contract from the list was caused by an oversight in the Department. (TR 359.)

In response to Mr. Degges letter, Bobby W. Blackmon responded on behalf of FHWA in a letter dated March 2, 2005. Paragraph 2 of that letter indicates that future contracts would not follow the pro-rata approach set out in Standard Specification 108.06. Paragraph 3 goes on to state that there were active projects with contracts which contained the incentive/disincentive language found in SP 108(B) which also contained the section 108.06 Standard Specification contract language, and that TDOT's practice had been to proportionately increase contract time where there were quantity over-runs. Mr. Blackmon concluded that in light of those considerations, "...it is appropriate to honor the use (sic) this approach on the projects listed in your letter." The letter went on to state that "...we will approve your request for a proportionate increase in contract time for quantity over-runs and the approved additional time can be used to adjust the incentive/disincentive dates."

In his testimony, Mr. Degges took a two part view of Blackmon's language. He stated that he believed the Blackmon letter said that 1) if a project was on the list and 2) if TDOT asked, then FHWA would agree to the use of the pro-rata method. (TR 944.) Mr. Degges also testified that he did not believe that any of the other contracts on the list were extended. (TR 915.) He also admitted that it was "bothersome" that RBCC had been granted an extension for

incentive and disincentive purposes based on delays and pro-rata quantity extensions on the Davidson County project but not on the Shelby County project. (TR 948.) He also acknowledged that he knew of no reason why the Shelby County project was left off the list since it was an existing contract involving ninety percent (90%) FHWA participation in a major city interstate project and included an incentive clause. (TR 935.)

Mr. Donoho admitted that when FHWA advised him that it did not want the incentive date extended on this contract, TDOT looked at the project differently. This conversation, according to Donoho, took place around the time of the February/March exchange of letters between Mr. Degges and Mr. Blackmon. This conversation "just preceded that". (TR 235, 845.) Specifically, Mr. Egan testified FHWA told him that if the Shelby County project was not on the list, they were not going to pay it and that if the RBCC Davidson County project had the same language, they should not have paid that one. Mr. Egan was afraid that FHWA would re-visit the payment made on the Davidson County project and dropped the issue. (TR 846, 848.)

On September 19, 2006, Mr. Nicely wrote Mr. Donoho requesting that the incentive/disincentive date contained in SP 108(B) be extended for one hundred fifty-two (152) days from December 15, 2006, because of "total quantity over-runs". (EX 30.) Mr. Nicely testified that he sent this letter because RBCC encountered over-runs, and he had learned this procedure on the Robertson Road/Briley Parkway project in Davidson County. (TR 498-499.) He based his request on "past experience" and a "reasonable belief" that TDOT would do the same thing on this project even though Bell did not know a special request would be necessary on bid day. (TR 476.) On the Robertson Road/Briley Parkway project, RBCC was granted an additional one hundred twenty-nine (129) days for quantity over-runs as well as thirty-three (33) days for additional work and forty-eight (48) days for delays encountered. (TR 525.) Mr. Nicely admitted that the Robertson Road/Briley Parkway project is the only project on which he is

positive that a pro-rata extension of the incentive date was granted. (TR 539.) He also testified that on every job where an incentive bonus was available to RBCC, it had earned it. (TR 512.)

Initially, Mr. Nicely was completely unaware of the correspondence between Mr. Degges and Mr. Blackmon of February and March of 2005. During his negotiations with Mr. Donoho over an extension because of pro-rata quantities, Mr. Donoho gave him a copy of this correspondence and told Mr. Nicely RBCC's contract completion date was not going to be extended because the Shelby County project was not on the list attached to Mr. Degges' letter. This was the first time Mr. Nicely was made aware of this list.

Mr. Klenk testified he did an analysis of the delays caused by the caisson drillings at the two bridges and the tract 163 right-of-way problem and then prepared a letter dated March 7, 2006, (EX 25) to Mr. Clayton explaining how he came up with a one hundred thirty-seven (137) day extension because of those two issues. (TR 649.) However, Mr. Klenk recommended that this extension apply only to the disincentive date and consequently, SA 24 (EX 24) was prepared accordingly. As stated above, RBCC refused to sign SA 24 because it did not extend the incentive completion date. In fact, the State argued that since eventually these two bridges were able to be completed in one phase (meaning that both lanes of traffic would be closed and an alternative route used), RBCC was able to more quickly complete the entire project. (TR 601.) It was the State's position that any delays caused by the caisson problems at the bridge had no impact on RBCC's completion of the project since they were able to shift assets to other activities during this period. (TR 769.)

Several witnesses testified that they requested more information from RBCC supporting its contention that delays created by the problems on the two bridges and with the 163 easement adversely impacted the completion date of the project but that this information was never forthcoming. (TR 257, 348, 804, 814.) Additionally, Mr. Egan testified that after A&H

analyzed the two items claimed to have caused the delay, TDOT agreed to grant RBCC one hundred thirty-seven (137) days, but it was clear that this extension applied only to disincentives and liquidated damages, and that this was done so that "the contractor would not be penalized or liquidated in any way because of the impacts these delays may have had on the project" (TR 758). TDOT relied on the assessment of these issues prepared by Mr. Klenk with A&H. (TR 769.) Mr. Egan also testified he did not believe the reason FHWA opposed paying an incentive on the Shelby County project was that it had just paid RBCC several million dollars in incentives on the Davidson County project. (TR 850.) With regard to the pro-rata method for extending the completion date, Witness Klenk testified it was not until after this project was completed that he was aware that TDOT even used such a procedure for awarding extensions. (TR 674.) He had never done a pro-rata analysis on a TDOT job and TDOT gave him no instructions on how to do it. (TR 670, 684.) No one at TDOT ever told him the reason behind doing a pro-rata analysis. (TR 679.) Mr. Klenk noted that according to Mr. Degges' letter to Mr. Blackmon of February 24, 2006, the pro-rata method contained in Standard Specification 108.06 helped the parties avoid going through each individual item of the project in order to come up with a pro-rata distribution of over-run costs. After analyzing the figures presented to him, Mr. Klenk concluded that poor soil conditions and additional traffic control, amounting to total monies in the amount of six million dollars ($6,000,000.00) should be used in any pro-rata computation. (TR 633.)

Mr. Clayton testified, and Exhibit 60 showed, that as of March 15, 2006, 102.15% of the original contract work had been completed. (TR 189.) This figure is found in the monthly construction report prepared by TDOT Project Supervisor John K. Smith. However, Mr. Clayton testified that all lanes of traffic were not open for travel on March 15, 2006. On December 12, 2006, Mr. Eric Criswell, also an engineer with A&H, sent TDOT an e-mail stating that "All lanes

and ramps are open to public per construction plans with only a few minor punch list items remaining" (TR 197, 665). On December 20, 2006, Mr. Klenk wrote Mr. Clayton that contract time charges were stopped effective December 17, 2006, since "...the project was determined to be substantially complete" and all lanes were open to traffic and the work remaining to complete the project was relatively insignificant (TR 198). Mr. Degges testified that RBCC, even with the problems encountered, completed the project according to the State by December 17, 2006. (TR 954.) Mr. Egan also testified that the project was substantially complete by that date and finally completed on November 17, 2007, because of additional paving work which a subcontractor was required to complete. (TR 720.)

Eventually, on April 9, 2007, extension of the contract completion date for incentive purposes was fully and finally denied by Mr. Donoho. (See EX 47.)

The State vigorously objected to the admissibility of Exhibits 70 through 80 and Exhibits 82 through 91 on the grounds of violation of the parol evidence rule, relevancy, and hearsay. Exhibits 70 through 79 involved other TDOT contracts which contained some language in Special Provision 108(B) similar to the language found in the Mid-town Memphis project. Exhibits 80 and 82 through 91 were Supplemental Agreements entered into between TDOT and various contractors for a variety of other projects across the State. (TR 284-304.) A great deal of time was spent at trial regarding the admissibility of these provisions from other contracts.

Decision

This case involves important issues of Tennessee contract law and significant amounts of money. As set out above, the funding formula for this project involved a ninety percent (90%) participation by the Federal government through the FHWA and ten percent (10%) provided by the State of Tennessee. The involvement of the FHWA in the evolvement of the issue now before the Commission is unmistakable.

The issue before the Commission boils down to whether RBCC is entitled to payment of an incentive bonus of up to $2.5 million even though the project was not completed by December 15, 2006, as seemingly strictly required by SP 108(B) of the original contract.

This issue itself has created a dispute over whether evidentiary efforts by the Claimant to explain the meaning of the contractual terms would violate the parol evidence rule, are not relevant to the issue before the Commission, and constitute hearsay evidence.

The relevant contractual terms are as follows:

> **Special Provision 108(B) ("SP 108(B)")**
> SPECIAL PROVISION REGARDING PROJECT COMPLETION AND INCENTIVE/DISINCENTIVE PAYMENTS.
> This project shall be completed in its entirety on or before December 15, 2006.
> For each calendar day prior to December 15, 2006, that all work in the original contract has been completed and all lanes are opened to the free, safe, and unrestricted passage of traffic, an incentive payment of ten thousand dollars ($10,000.00) per day shall be made to the contractor as an incentive. However, the maximum amount of incentive payments shall not exceed two million five hundred thousand dollars ($2,500,000.00).
> For each day after December 15, 2006, that all work in the original contract is not completed, the sum of ten thousand dollars ($10,000.00) per day shall be deducted from monies due the Contractor as a disincentive. The amount of monies that may be deducted as a disincentive shall be unlimited except that the disincentive may be waived if the working time is extended in accordance with the Standard Specifications.
> . . . .
> The December 15, 2006, completion date may be extended in accordance with the Standard Specifications, however, no incentive payment will be made if work is not completed in its entirety by December 15, 2006.
> Liquidated damages for failure to complete all work on this project in its entirety on or before December 15, 2006, shall be applied independently and additive of any incentive and/or disincentive payments described above. (Exhibit 1.) (Emphasis supplied.)

Standard Specifications 108.06 – Determination of Time for Completion.

The Contractor shall complete the Work in full accordance with Subsections 104.01 and 105.03 within the number of working days or calendar days or by the completion date stipulated in the Proposal.

. . . .

The number of days for performance allowed in the Contract as awarded is based on the original quantities as defined in Subsection 102.03. If satisfactory fulfillment of the Contract requires performance of work in greater quantities than those set out in the proposal, the contract time allowed for performance shall be increased on a basis commensurate with the amount and difficulty of the added work. If the Engineer determines that an increase in the contract working time proportionate to the value of the increase in quantities is commensurate with the amount and difficulty of the added work and a written request to extend time as provided below has not been made, he may proportionately increase the contract working time.

If the Contractor finds it impossible for reasons beyond his control to complete the Work within the contract time as specified or as extended in accordance with the provisions of this Subsection, he may, at any time prior to the expiration of the contract time specified or as extended, make a written request to the Engineer for an extension of time setting forth therein the reasons which he believes will justify the granting of his request. ... If the Engineer finds that the work was delayed because of conditions beyond the control and without the fault of the Contractor, he may extend the time for completion of a properly executed Supplemental Agreement in such amount as the conditions justify. The extended time for completion shall then be in full force and effect the same as though it were the original time for completion. (Exhibit 7.) (Emphasis supplied.)

Contract CNB004 – **[Order of Precedence Clause]**

The Contract Documents are intended to be complementary and to describe and provide for a complete work. Requirements in one of these are as binding as if occurring in all of them. In case of discrepancy, Supplemental Specifications will govern over the 1995 Standard Specifications; the Contract Plans will govern over both Supplemental and Standard Specifications, and Special Provisions will govern over both Plans and Specifications. (Exhibit 1, p. 7.)

Also, extremely important in the determination of the issues in this case are Exhibits 20 and 21, the February and March 2005, correspondence between officials with the TDOT and the FHWA.

a) CERTAIN EVIDENTIARY CONSIDERATIONS

At trial, the State strongly opposed the admission of Exhibits 70 through 79, 80 and 82 through 91, as well as Exhibits 20 and 21. The State clearly preserved in this record its vigorous objections to admitting any of these documents.

The grounds for the State's objections are three-fold. First, the State contends admission of the exhibits would violate the parol evidence rule. Further, the State argues that consideration of these documents is irrelevant to the determination of the issue before the Commission and constitutes hearsay evidence.

First, the Commission will address the State's parol evidence objection.

In Tennessee, the parol evidence rule is a rule of substantive law and not a mere rule of evidence. *Maddox v. Webb Construction Co.*, 562 S.W.2d 198, 201 (Tenn. 1978). Normally, the intention of the parties to a contract cannot be thrown into doubt by proof "tending to show an intention different from that manifested by the words of the instrument". *Teague v. Sowder*, 114 S.W.484 (Tenn. 1908) quoting *Weatherhead v. Sewell*, 28 Tenn. (9 HUMPH.) 272, 295 (1848), 1848 WL 1858. However, where a latent ambiguity arises in a contractual dispute, parol evidence may become admissible.

The question then becomes what constitutes a latent ambiguity. The *Teague* Court used the following language to describe this concept:

> A latent ambiguity is where equivocality of expression or obscurity of intention does not arise from the words themselves, but from the ambiguous state of extrinsic circumstances to which the words of the instrument refer and which is susceptible of explanation by the mere development of extraneous facts, without altering or adding

> to the written language or requiring more to be understood thereby than will fairly comport with the ordinary or legal sense of the words and phrases made use of. *Weatherhead v. Sewell, supra* at 12; see also *Frank Rudy Heirs Associates v. Moore and Associates, Inc.*, 919 S.W.2d 609, 613 (Tenn. Ct. App. 1995) – "A contract is ambiguous when its meaning is uncertain, and it can be understood in more ways than one." See also *Estate of Burchfiel v. First United Methodist Church of Sevierville*, 933 S.W.2d 481, 482 (Tenn. Ct. App. 1996).

In making a determination as to whether an ambiguity is present, "the language in dispute must be examined in the context of the entire agreement". *Gredig v. Tennessee Farmers Mutual Insurance Company*, 891 S.W.2d 909, 912 (Tenn. Ct. App. 1994); citing *Cocke County Bd. of Highway Commrs. v. Newport Utils. Bd.*, 690 S.W.2d 231, 237 (Tenn. 1985).

If, in fact, a latent ambiguity is identified, the fact finder is permitted to "…consider the contracting parties' conduct and statements regarding the disputed provision … in construing and enforcing the contract." *Allstate Insurance Co. v. Watson*, 195 S.W.3d 609 (Tenn. 2006); citing *Vargo v. Lincoln Brassworks, Inc.*, 115 S.W.3d 487, 494 (Tenn. Ct. App. 2003). In this process, the Court in considering such admissible parol evidence "…may [also] consider the situation of the parties, the business to which the contract relates, the subject matter of the contract, the circumstances surrounding the transaction, and the construction placed on the contract by the parties in carrying out its terms." *Simonton v. Huff*, 60 S.W.3d 820, 825 (Tenn. Ct. App. 2000).

This entire process, once parol evidence is found to be admissible, comports with what has been categorized as a "universal rule" that contracts "…must be viewed from beginning to end and all of [their] terms must pass in review, for one clause may modify, limit, or eliminate another". *Cocke Co Bd. of Highway Commrs. v. Newport Utils. Bd., supra,* at 237.

Therefore, the initial issue which must be addressed in this case is whether or not there is an ambiguity present in the contractual provisions involved in this case. With regard to the prime issue in this case, that being the eligibility of RBCC for the incentive bonus of up to $2.5

million dollars ($2,500,000.00), the State argues vigorously that SP 108(B) is excruciatingly clear that no incentive payment whatsoever should be paid unless the work involved in the contract was completed in its entirety by December 15, 2006. The State acknowledges that the disincentive and perhaps the liquidated damages provisions of the contract could be avoided by an extension of the completion date but that SP 108(B) is clear on its face regarding earning an incentive.

The State also contends that the order of precedence clause set out above makes it clear that the provisions of this Special Provision are to control over any Standard Specifications which might be construed to authorize an extension of the original completion date.

On the other hand, RBCC contends just as vehemently that there is no prohibition in the entire contract against moving back the completion date set out in SP 108(B) by utilizing SP 108.06 since the completion date was dramatically affected by delays and cost over-runs completely beyond its control. RBCC alleges that reading the contract in this fashion is consistent with past practices in TDOT/FHWA contracts, as well as the early 2005 agreement between those two agencies to continue that practice as evidenced by the Degges/Blackmon February/March correspondence of that year.

The Commission FINDS that there is an egregious ambiguity in these contractual provisions.

SP 108(B) in this contract requires completion of "all work in the original contract" before RBCC could earn an incentive bonus. In fact, there is arguably proof in this record that the originally contemplated work was complete months before December 15, 2006, as evidenced by Exhibit 60.

The ambiguity here develops since the order of precedence clause set out above at page 23 (see Ex. 1, p. 7) provides clearly that theoretically SP 108(B) (Ex. 1) would trump Standard

Specification 108.06, which provides for extension of the completion date where there are over-runs and unanticipated delays in completing that same original work ["the extended time for completion shall then be in full force and effect the same as though it were the original time for completion." – Ex. 7, Standard Specification 108.06, emphasis supplied]. In other words, Special Provision 108(B) seemingly requires completion of the original work in its entirety but fails to take into account circumstances dealt with in Standard Specification 108.06 which may change the nature and content of that original work for reasons completely out of the control and unanticipated by either the State or the contractor.

Supporting the conclusion that there is an ambiguity here is the further consideration that if the parties and the Commission are not allowed to resort to the provisions of Standard Specification 108.06, then those provisions are made useless or superfluous, since the contract would not have been considered in its entirety. *Paul v. Insurance Co. of N. Am.*, 675 S.W.2d 481, 483 (Tenn. Ct. App. 1984).

This ambiguity becomes even more confounding in light of the proof here that apparently both TDOT and the FHWA had for a number of years extended both incentive and disincentive dates, and agreed to do so again in February of 2005, on a list of "existing" and "active" contracts – a list from which the contract at issue here was inexplicably omitted. (See Exhibits 20 and 21.)

This constellation of ambiguities is further accentuated by the fact that around the time of the completion of this project, RBCC had completed for TDOT another project involving in excess of forty-three million dollars ($43,000,000.00) in Davidson County, containing the exact same language as SP 108(B) here and was granted an extension of the completion date which qualified it for an incentive bonus in excess of two million dollars ($2,000,000.00).

In light of this complex set of circumstances, created not only by the terms of the contract itself but by the circumstances surrounding the implementation of its terms, a definite latent ambiguity exists for which parol evidence not only is admissible, but frankly, absolutely necessary in both understanding and deciding the issues in this case.

b) FUTHER PAROL EVIDENCE, RELEVANCE, AND HEARSAY CONSIDERATIONS

The intense argument over whether Exhibits 70 through 80 and 82 through 91 should be considered is in some respects a tempest in a teapot. The Commission makes that observation for the following reasons. First, with regard to Exhibits 70 through 79, although it is clear that Exhibits 72, 73, 74, 75, and 78 contain language identical to SP 108(B) here, there is no proof that in fact an extension of the original completion date was necessary [with the exception of Exhibit 72 – the RBCC Davidson County project] in order for the contractors to earn an early completion bonus on those contracts. Likewise, with regard to Exhibits 80 and 82 through 91, although Supplemental Agreements were authorized in connection with those contracts, there is no proof that language similar to SP 108(B) was contained in the underlying contracts on those jobs and that incentives actually were earned based on extended completion dates. To be sure, with regard to these Supplemental Agreements, there appear to be indications that additional monies were paid to the contractor by TDOT. However, there is no proof that these monies constituted incentive payments or perhaps were merely monies paid for additional work done. The Commission has prepared a chart analyzing Exhibits 70-79, 80, and 82-91, which is attached hereto as Exhibit A.

The State also opposed the introduction of Exhibits 20 (with attached list) and 21, and Exhibits 70 - 79, 80, and 82 - 91, on the grounds that their contents were not relevant to the issues now before the Commission and also constituted hearsay.

The Tennessee Rules of Evidence define relevant evidence as follows:

> 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Tenn. R. Evid. 401.

Of course, all relevant evidence is admissible and evidence not relevant is not admissible. (Tenn. R. Evid. 402.)

As stated above, the Commission has some real reservations about the relevance of the Supplemental Agreements (EXS 80, 82 – 91) conditionally admitted at trial since there does not appear to be any proof that with those contracts, incentive payments were made following an extension of the completion dates. However, Exhibits 20, 21, and 70-79 are extremely relevant since they appear to address clearly the possibility of earning an incentive even though the initial contractual completion date was not met.

In *Keith v. Murfreesboro Livestock Market, Inc.*, 780 S.W.2d 751 (Tenn. Ct. App. 1989), the Court said that "For proof of an extrinsic transaction to be admissible, it must be relevant to some disputed, material issue … and it must bear some similarity to the transaction at issue." *Id.* at 757. (Emphasis supplied.)

In light of the multiple unanswered questions surrounding the completion of this contract and whether the Claimant should be paid an incentive bonus, the Commission FINDS Exhibits 20, 21, 70 – 79, 80, and 82 - 91 to be relevant to the issues now before it.

The Claimant also contends that none of the above referenced documents or the testimony discussing the same constitutes hearsay evidence. The Claimant relies on the Tenn. R. Evid. 803(1.2), 803(8), and 804(b)(3) in opposition to the State's hearsay objection.

Rule 804(b)(3) provides as follows:

> Statement Against Interest.
>
> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

This particular Rule would not appear to be applicable in this setting with regard to Exhibits 70 – 79, 80, and 82 – 91 since those documents were not generated at a time when the creator of the documents could have anticipated their contents would be somehow construed against the State's interests in this litigation. However, the Rule arguably could be used as a justification for admitting Exhibits 20 and 21 since the evidence showed that the State's consulting engineer, Mr. Klenk with Allen and Hoshall, may have been anticipating possible extension requests in connection with earlier issues that had arisen in connection with the construction of retaining walls. (TR 688.) Also, clearly, Mr. Degges and Mr. Blackmon were aware a dispute was brewing in early 2005 since they were involved in serious correspondence involving a change in contract specifications which were made some fifteen (15) years before and which had left "…lingering questions on our procedures for making adjustments to contract working time". (EX 20.) These written utterances from the State and Federal government address a festering dispute which both parties appear to have acknowledged might have financial consequences. For this reason, the Commission FINDS that this correspondence is admissible under Rule 803(b)(3).

Tenn. R. Evid. 803(1.2), **Admission by Party-Opponent**, provides as follows:

> The following are not excluded by the hearsay rule:
>
> . . .
>
> (1.2) *Admission by Party-Opponent.* A statement offered against a party that is (A) the party's own statement in either an individual or a representative capacity, or (B) a statement in which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by an agent or servant concerning the matter within the scope of the agency or employment made during the existence of the relationship under circumstances qualifying the statement as one against the declarant's interest regardless of declarant's availability, or (E) a statement by a co-conspirator of a party during the course of and in furtherance of the conspiracy, or (F) a statement by a person in privity of estate with the party. A statement is not excluded merely because the statement is in the form of an opinion. Statements admissible under this exception are not conclusive.

Tenn. R. Evid. 803(8) reads as follows:

> **(8) Public Records and Reports.**
> The following are not excluded by the hearsay rule:
>
> Unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness, records, reports, statements, or data compilations in any form of public offices or agencies setting forth the activities of the office or agency or matters observed pursuant to a duty imposed by law as to which matters there was a duty to report, excluding, however, matters observed by police officers and other law enforcement personnel.

As discussed at length above, the State's primary objection to the questioned items appears to rely more on parol evidence considerations than objection based on relevancy and hearsay. Nevertheless, all of the questioned items are contained within the records of TDOT and are therefore admissible under Rule 803(8). Likewise, and particularly in the case of the Degges/Blackmon correspondence, all of the objected to Special Provisions, Supplemental Agreements, and correspondence, appear to be admissible and not hearsay in the context of this case.

Therefore, for the reasons discussed the Commission FINDS Exhibits 70 – 80, 82 – 91, and 20 and 21 to be admissible for purposes of reaching a decision in this case.

c) Should the contract completion date be extended so that RBCC would be paid an incentive bonus by TDOT?

Under SP 108(B), it was possible for RBCC to earn an incentive bonus of ten thousand dollars ($10,000.00) per day for every day in advance of December 15, 2006, "that all work in the original contract has been completed and all lanes are open to the free, safe and unrestricted passage of traffic".

An incentive/disincentive program had been implemented by TDOT in the 1990's and used up through 2007. (TR 164, 452-453.) The purpose of such a system, as is the case now with A+B bidding and no excuse bonuses, is to encourage contractors to complete their work in a timely fashion – and hopefully early – thus reducing inconvenience and improving safety for motorists. It is clear that the incentive possible on the contract in this case was perhaps the largest, or at least one of the largest, ever offered on a TDOT project up to that point. The amount of the bonus is indicative of the importance of the work involved to TDOT.

The evidence showed that FHWA was integrally involved with the administration of the contract. Mr. Egan, in his testimony, even referred to the officials there as his "superiors". (TR 760.) For example, Mr. Egan testified that when Scottie Plunk with TDOT forwarded proposed Supplemental Agreement 24 to RBCC on March 1, 2006, he and possibly Plunk already had held discussions with FHWA. (TR 799.) Mr. Egan went on to testify that when RBCC's claim was presented to FHWA, it responded that it did not know if it would participate or not. (TR 854.) According to Mr. Donoho, in 2005, FHWA took the position that the pro-rata method of adding additional days to the completion date was not consistent with its policies. (TR 346, 349.) Mr. Donoho testified that this project's incentive was looked at differently because FHWA made

TDOT look at it differently although Mr. Egan testified the Federal government "ha[d] approved moving the completion date for incentive and disincentive purposes" on other occasions. (TR 304, 855-856.) Implicitly acknowledging the pro-rata method of extending time, Mr. Donoho wrote to Mr. Clayton at RBCC on January 30, 2007, that use of the method was not automatic "regardless of how this method may have been implemented in the past". (See Exhibit 42.)

Mr. Clayton, a seventeen (17) year employee of TDOT, prior to moving into the private sector and project manager for RBCC on this project, testified that he had never seen a dispute over incentives and disincentives like in this case, but that there were few contracts with such provisions. (TR 452.)

Mr. Donoho testified that on other projects he had been involved with at TDOT on which RBCC was the contractor, RBCC attempted to earn incentives. (TR 231-232.) Mr. Donoho also acknowledged that prior to February of 2005, incentive dates could and had been extended. (TR 236.) He acknowledged the similarity between SP 108(B) in this Shelby County contract and the same provision in RBCC's Robertson Road/Briley Parkway Project in Davidson County. (TR 272, EX 72.) It will be recalled that the Davidson County contract was entered into on October 1, 2002, with an anticipated completion date of November 1, 2005 – some nine (9) to ten (10) months after the Degges/Blackmon letter exchange of February/March 2005, and that the completion date was later extended to April of 2006, with the consequence that RBCC earned a bonus of two million five hundred thousand dollars ($2,500,000.00). (TR 274 and EX 66.)

According to Mr. Degges' testimony, both he and FHWA were concerned about extending a contract time every time there was an over-run on quantities. FHWA was pushing TDOT to establish more concrete completion dates. (TR 902.) In fact, Mr. Degges testified that he was being "pushed" by FHWA to "kind of take a stand" and that because of the flexibility TDOT's Specifications gave it, it wanted to start moving forward in its management of contracts.

(TR 901.) Additionally, Mr. Degges testified that both TDOT and FHWA were trying to get to the point where they would use a CPM on projects in order to make a determination whether contract changes impacted the completion date. (TR 903.) Mr. Donoho testified that the change in Standard Specification 108.06 requiring use of a CPM in order to earn incentives took effect on March 1, 2006.

The pro-rata adjustment method for extending completion dates was discussed in Chief Engineer Degges' letter to Mr. Blackmon of FHWA. (EX 20.) According to that letter, use of pro-rata adjustments allowed TDOT to modify its contracts "based on over-runs and contract quantities". Mr. Donoho testified that this method had been used in the past by TDOT. (TR 239.) However, according to Mr. Degges, the pro-rata approach probably ended around the time frame of his correspondence with Mr. Blackmon in February and March of 2005. (TR 909.) Mr. Degges testified that the list attached to his letter to Mr. Blackmon was part of an effort to streamline the process and "basically move forward with projects that were either newly let to contract or had not been let to contract yet". (TR 911.) This is clearly not the case since the contracts listed on his exhibit were entered into between 1999 and April 15, 2004. (TR 911 and EX 20.) According to Mr. Donoho and the language of Mr. Degges' letter, under existing contracts TDOT wanted to continue using the pro-rata method and requested that FHWA concur with that position. Attached to the Degges' letter is a list of "existing contracts" which "in fairness" should continue using the pro-rata or cost estimation method for establishing contract time and then "...beginning with the February 2005 letting, the department [would] no longer consider paying incentives on any projects that [were] not complete by the original contract completion dates". (TR 242-243.)

The proof showed that a primary drafter of Mr. Degges' letter was Mr. Donoho and that the list of existing projects attached to that letter was compiled by assistant directors working

under Mr. Donoho. (TR 243.) Mr. Egan and Mr. Donoho agreed that if the Shelby County Mid-Town project had been included on this list the incentive would have been paid, and that Mr. Blackmon and Mr. Degges agreed that contracts in existence prior to 2005 would be paid consistent with past practice. (TR 847.) There is no evidence in this record explaining why the contract here, containing language identical to five of the contracts listed on Mr. Degges' list, and in place since 2003 was not included on that list.

Mr. Donoho, after reviewing Exhibit 21, testified that Mr. Blackmon had responded to Mr. Degges that "...it is appropriate to honor the use of this approach on the projects listed in your letter". (TR 258.) In fact, he testified that there was no objective reason why the Shelby County project had been left off the attached list, and that if it had been there, he would have looked at RBCC's claim differently. (TR 242.) In fact, he also stated that the incentive date was changed (extended) on the Davidson County Robertson Road/Briley Parkway project because it was on the list. (TR 279.)

Currently, TDOT does not change incentive dates for any reason other than acts of God and such. This policy is a direct result of the correspondence between Degges and Blackmon in 2005. (TR 245.)

This change in policy was evidenced by the implementation – for the first time in Tennessee – of a no excuse bonus in SP 108(B) in a TDOT Knox County contract dated February 25, 2005. (TR 282-283, 533.) Another approach to the issue of determining when bonuses are payable is the use of something known as the A+B formula and it was used in contracts dated September 20, 2005, on projects being carried out in Knox and Davidson counties. (TR 283-284 and EXS 67 and 69.) Now, according to Mr. Nicely, contractors know

going into a job that there is not going to be any bonus unless the work is completed by a certain date with no explanation or excuses countenanced.[6] (TR 584.)

Although RBCC in its post-trial filings eschews reliance on theories of habit, custom, or usage by TDOT in handling claims for extension of contract completion dates, the Commission FINDS that the proof developed over four days of trial establishes clearly that up until February or March of 2005, TDOT and FHWA permitted extensions of completion dates for purposes of earning incentives, even in the face of the language contained in SP 108(B).

This case is a strong example of why parol evidence is sometimes admitted in establishing the full intent of parties to a contract.

While no one disputes the fact that "...courts have no rightful authority to make contracts for litigants", where there is an ambiguity based on either the language or the circumstances surrounding a contract, the Commission, although not entitled to contradict or vary terms by oral evidence, may survey an entire situation to ascertain what the parties had in mind when they attempted to agree to a contract and the purpose or object at which the contract was directed. (*Kroger Co. v. Chemical Securities Co.*, 526 S.W.2d 468, 471 (Tenn. 1975); citing *Frierson v. International Agr. Corp.*, 148 S.W.2d 37 (Tenn. Ct. App. 1940).)

Scholarly works on contract law have confirmed the availability of parol or extrinsic evidence of custom and usage in the interpretation of ambiguous contracts. For example, the leading treatise on contract law, Williston on Contracts, states the following:

> As a general rule at common law, parol or extrinsic evidence is admissible to explain or supplement terms of a contract which are ambiguous or uncertain as used in the contract and cannot be satisfactorily explained by reference to other portions of the contract. Under this common-law principle, usage is admissible to explain or interpret ambiguous terms or provisions of the contract.

[6] The Degges-Blackmon correspondence addresses only the pro-rata method of extending a contract completion date. It does not address possible additional days for unanticipated delays. Both methods are set out in Standard Specification 108.06 as it read when the contract dealt with here was entered into.

. . . .

> The common-law parol evidence rule requires a finding that the contract is ambiguous prior to the admission of evidence of usage. Consequently, where the Court determines that a contractual provision is ambiguous, it is appropriate to refer to extrinsic evidence, including industry custom and practice, to determine the parties' intent.

See Lord, Williston on Contracts, Chapter 34, Usage and Custom, Subsection 7, Effect of Usage on Parol Evidence Rule (2008).

Tennessee Jurisprudence has the following to say in that same connection:

> Any statements, acts, or writings of the parties in any business custom known to them may be considered to the extent that they reflect upon the mutual intent of the parties at the time of the making of the contract as to the meaning of the word or phrase used by the parties in their contract. In all contracts as to the subject matter of which known usages prevail, the parties will be held to have proceeded on the tacit assumption of such usages, and to have contracted in reference to them, unless the contrary appears, and the usages form a part of the contract.
>
> . . . .
>
> A general usage may be proved in proper cases to remove ambiguities and uncertainties in a contract, or to annex incidents, but it cannot destroy, contradict, or modify what is otherwise manifest. ... The actual custom or usage of the parties in dealing with each other is as much a part of the contract under this rule as a general custom prevailing in the trade.

Tennessee Jurisprudence, Contracts, Section 58 Custom and Usage at pp. 141-142 (2008).

In *Beaty Chevrolet, Inc. v. Complete Auto Transit, Inc.*, 586 S.W.2d 122 (Tenn. Ct. App. 1979), a case involving delivery practices of new vehicles to an automobile dealer, the Court quoted *Charles v. Carter*, 36 S.W. 396 (Tenn. 1896), which in turn cited Bishop on Contracts, § 449, for the following proposition:

> Proof of custom or usage known to both parties to a contract, either in fact or presumptively from its long continuous, notorious character, or otherwise, if it is not in conflict with the law or its policy, if it is reasonable, and as to the place, business, or person

> uniform and universal, will be accepted like the general law not in contradiction of written stipulations, but as explaining what is indistinct in them, and furnishing the rule where they are silent. *Id.* at 125.

In *First American Nat'l Bank of Nashville v. Hunter*, 581 S.W.2d 655 (Tenn. Ct. App. 1978), the Court was attempting to determine what number of days are in a year where an instrument provided for "interest at __ percent per annum". Finding that there was a latent ambiguity where a thirty (30) day note called for interest at the rate of nine and three-fourths percent (9 ¾ %) per annum, the Court noted a thirty (30) day note could be computed as 30/365 days, 30/365.25 days, 30/366 days [leap year], or "some other fraction of the annual charge". In view of what the Court determined to be a latent ambiguity, it held that it could resort to "...any statements, acts or writings of the parties and any business custom known to them ... to the extent that it reflects upon the mutual intent of the parties at the time of making of the contract as to the meaning of the word or phrase used by them in their contract". *Id.* at 659.

Coble Systems, Inc. v. The Gifford Company, 627 S.W.2d 359 (Tenn. Ct. App. 1982) dealt with damages to a truck and the lessee's liability for those damages under its agreement with the lessor. Certain allegedly parol evidence was excluded by the trial judge in interpreting the contract. The Court of Appeals found that the trial court was in error in excluding the tendered evidence but held that no useful inferences could have been drawn from that evidence in the interpretation of the agreement. Nevertheless, the Court did cite both *Kroger Co. v. Chemical Securities Co.*, 526 S.W.2d 468, 471 (Tenn. 1975) and *Frierson v. International Agr. Corp.*, 148 S.W.2d 37 (Tenn. Ct. App. 1940), *supra*, for the proposition that where an ambiguity is present, the fact finder may review the entire set of circumstances in an attempt to ascertain the parties' intent at the time of the contracting including prior dealings they may have had and the situation of the parties at the time of contracting. *Id.* at 362-363.

Of course, marital dissolution agreements are also contracts and in *Floyd v. Floyd*, No. M2000-0234-COA-R3-CV, 2001 WL 997380 (Tenn. Ct. App. 2001), the Court wrote that in placing itself in the situation of contracting parties where there is ambiguity, the Court could consider "Evidence of intent ... found in the language used by the parties considered in the light of their interests and other relevant circumstances at the time the contract was executed, and in the practical construction given to the language by the parties 'as disclosed by their actions subsequent to its execution'." (Citing and quoting *City of Columbia v. C.F.W. Const. Co.*, 557 S.W.2d 734, 739 (Tenn. 1977).)

Based upon the extensive evidence introduced at the trial of this matter, the Commission FINDS that there was an ambiguity in this contract, based upon both the language and the circumstances surrounding the entering into and performance of the same, created by Standard Specification 108.06 and SP 108(B), both of which, according to the terms of the contract, are a part of it and are "complementary". (See EX 1.)

It is clear that for a number of years, as shown by the Degges/Blackmon correspondence of early 2005, exceptions to the no extension language for incentives found in SP 108(B) had been regularly made. Apparently, a watershed change in the way of awarding incentives took place in early 2005 unbeknownst to RBCC, and for that matter, perhaps other contractors, when FHWA decided unanticipated delays and pro-rata quantity increases could not, under its regulations, provide a basis for extending completion dates for purposes of earning an incentive. As a primary provider of funds for large highway construction projects in Tennessee, here, ninety percent (90%), the FHWA obviously was integrally involved with projects such as this one.

According to the testimony, use of the methods involved here to extend the completion dates for purposes of earning an incentive was involved in a small subset of the total set of

construction projects overseen by TDOT. RBCC had been the beneficiary of such an extension with regard to the Davidson County, Robertson Road/Briley Parkway project which was entered into on October 1, 2002, with an effective date of November 25, 2002. The originally bargained for completion date was November 1, 2005. However, pursuant to a Supplemental Agreement signed by TDOT's Director of Construction on March 13, 2006, the completion date, for purposes of earning an incentive, was extended to April 26, 2006. As a result of that one hundred seventy-seven (177) day extension, RBCC received an incentive bonus of two million five hundred thousand dollars ($2,500,000.00). Mr. Nicely testified that in fact it was TDOT which had taught him how to apply for an extension of the incentive date during the course of the Robertson Road/Briley Parkway project.

The timing of the approval of the extension on the Davidson County project is particularly intriguing since the proposed Supplemental Agreement in this case, SA 24 (EX 24), providing for an extension of the date to avoid a disincentive (but not to earn an incentive), was sent by Mr. Plunk of TDOT to RBCC on March 1, 2006, twelve days before TDOT's Director of Construction signed a Supplemental Agreement (EX. 66) extending the completion date for purposes of earning a bonus on the Robertson Road/Briley Parkway project even though the language of SP 108(B) in both contracts was virtually the same. This discrepancy in the State's positions vis-à-vis these two contracts is difficult and perhaps impossible to logically reconcile.

Therefore, it is clear to the undersigned that based upon TDOT's past practice of extending incentive dates as well as RBCC's recent experience in Davidson County, a fair interpretation of the contract here, as entered into in November of 2002, is that the completion date could be extended not only for avoiding disincentives and liquidated damages but also for purposes of earning the ten thousand dollar ($10,000.00) a day incentive.

The undersigned was particularly impressed by the candid testimony given by both Mr. Donoho and Mr. Egan. Mr. Donoho was clearly uncomfortable in testifying that the SP 108(B) incentive date could not be extended. On several occasions, under examination, Mr. Donoho used the phraseology "as it is written" in agreeing that incentive dates could not be extended. Mr. Donoho clearly knew that in the past incentive dates had been extended even though, read literally, the language seems to prohibit such an extension. His candor in so testifying is commendable. (TR 316.)

Also, Donoho and Egan both indicated in their testimony that human clerical error was in all likelihood the reason this project was not listed on the attachment to Mr. Degges' letter to Mr. Blackmon in February of 2005. Both engineers also were willing to admit that had this project simply been included on that attachment, the incentive bonus would have been paid since it was an existing project carried out before the TDOT and the FHWA moved to new methods of earning bonuses.

On the other hand, Egan's and Degges' testimony that they did not know who made the decision not to extend the Shelby County completion date for bonus purposes was completely unbelievable. (TR 745 and 952.) The very idea that the Chief Engineer for the State of Tennessee and the Assistant to TDOT's Director of Construction, in Mr. Egan's case, did not know who made the final decision on a two million five hundred thousand dollar ($2,500,000.00) issue is simply not acceptable.

"The cardinal rule for interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention consistent with legal principles." *Floyd v. Floyd, supra, citing Rainey v. Stansell*, 836 S.W.2d 117 (Tenn. Ct. App. 1992); see also *Ohio Cas. Co., Inc. v. Travelers Indemnity Company*, 493 S.W.2d 465 (Tenn. 1973). "Even if a written document has been assented to as the complete and accurate integration of the terms of a contract, it must still

be interpreted and all of those factors that are of assistance in this process may be proved by oral testimony." *Burlison v. United States*, 533 F.3d 419, 429-30 (6th Cir. 2008). Further, in that interpretation process, Tennessee law requires that an interpretation be reasonable. *ECG, Inc. v. Southeast Elevator, Inc.*, 912 S.W.2d 163 (Tenn. Ct. App. 1995), *Moore v. Moore*, 603 S.W.2d 736, 739 (Tenn. Ct. App. 1980).

Although the financial stakes are high in the instant case, denying RBCC an early completion bonus on this project, delayed as it was by problems at two bridge sites and involving performance of millions of dollars in additional work is both unreasonable and out of sync with the parties' agreement. The proof shows that even as early as March of 2005, RBCC had completed one hundred and two percent (102%) of the original projected work. (EX 60.) Further, although the State's position was that throughout the project when RBCC was stymied at one work location it could merely move to another area and complete other aspects of the job, is simply not borne out by the proof. (TR 133, 162, 163.) Apparently, this shifting of work sites because of problems encountered also impacted the paving work done by subcontractor APAC since the State's consulting engineer – Klenk - testified that APAC complained of having to do their work in a piecemeal fashion because of so many phases and sub-phases occurring on this job. (TR 610.)

The State's insistence that RBCC could merely shift its resources to other aspects of the job when problems were encountered is also curious in light of its emphasis – in its own proof – on the schedules (EX 6) developed by RBCC for completing the work, as well as the State's misplaced reliance on a critical path method, which was not required under this contract. Obviously, the State acknowledges the importance of completing work in a sequential fashion and cannot be heard now to criticize RBCC for seeking more days, pursuant to an established practice for bonus purposes, when it was thrown off schedule by circumstances it did not create.

As stated above, the undersigned acknowledges that the financial stakes involved in this care are significant. The State has now implemented other methods for earning a bonus which would appear to much more antiseptically avoid the kind of issues we have in this case through the use of "no excuse" or A+B bidding methods for determining eligibility for bonuses. However, in this case, the Commission FINDS that RBCC, TDOT, and FHWA were working under a system that clearly involved payment of bonuses even though the initial completion/incentive date was not met when unanticipated delays and quantity over-runs were encountered.

There may well have been a change in FHWA policy in perhaps late 2004 and early 2005 but this contract was entered into well before that, and there is no evidence that the ground rules for interpreting the terms of this contract had changed prior to its effective date.

The question then becomes how much of a bonus should be paid to RBCC in light of my decision.

Contract Damage Awards.

The monetary relief sought by the Claimant in this matter consists of four components. Of course, the primary damages sought consist of incentive payments in the amount of ten thousand dollars ($10,000.00) per day with a maximum of two million five hundred thousand dollars ($2,500,000.00). Secondly, the State has assessed disincentive payments against RBCC in the amount of one hundred seventy thousand dollars ($170,000.00), as well as liquidated damages of twenty-three thousand eight hundred dollars ($23,800.00), and Claimant wants these returned. The Parties also made it known to the Commission at trial that retainage payments under the contract in the amount of one million three hundred forty-nine thousand six hundred thirty-nine and 94/100 dollars ($1,349,639.94) had not been released. Finally, a relatively small sum in the amount of eighty-five thousand six hundred thirty-seven and 36/100 dollars

($85,637.36) for unpaid but approved supplemental agreements, unpaid amounts for asphalt purchased, and for a crash preventive device known as an impact attenuator was still outstanding.

The determination of the damages for these items will be dealt with in that order.

First and foremost, of course, is the issue of the amount of an incentive award. As discussed above, RBCC has established that the incentive date should be extended because of delays in the project and additional quantities of work done. RBCC contends the date should be extended from December 15, 2006, to May 1, 2007, a total of three hundred eight (308) days.

Initially, RBCC requested one hundred fifty-four (154) days because of the delays it encountered at the Faxon Avenue and North Parkway bridges and at tract 163. Eventually, TDOT, through Mr. Klenk at Allen and Hoshall who had worked on this project since 1988, conceded that additional days appeared to be due because of these delays and suggested that a one hundred thirty-seven (137) day extension would be appropriate for avoiding the imposition of a disincentive penalty but not for earning the incentive. The letter from Mr. Klenk to RBCC's project manager, Mr. Clayton, is dated March 7, 2006. (EX 25.) Mr. Donoho confirmed the appropriateness of the one hundred thirty-seven (137) day figure in a July 6, 2006, letter to Mr. Clayton, although he too refused to apply those days to an extension of the incentive date. (EX 29.) Both of these Exhibits were admitted into evidence without objection by the State.

Of course, this same figure was used in the proposed SA 24 but, again, the extension applied only to the disincentive date and not the incentive date. (EX 24.)

The Commission FINDS, based upon the proof presented by the Claimant as well TDOT's apparent concession that the bridge and easement problems discussed above did in fact impede RBCC's completion of its work to a date at least one hundred thirty-seven (137) days past December 15, 2006.

The second component of RBCC's request for extension of the completion/incentive date involves quantity over-runs. RBCC claims seven million eight hundred ninety-six thousand one hundred eighteen dollars ($7,869,118.00) in cost over-runs which utilizing the pro-rata method it relied on in its proof would result in an extension of one hundred ninety-one (191) days. (EX 43.) On the other hand, the State, again through Mr. Klenk, in a letter dated April 9, 2007, to TDOT Director of Construction Donoho agreed that "some pro-rata time may be justified", again, however, only for purposes of negating a disincentive penalty. In a memorandum from Mr. Klenk to the State dated August 26, 2008, he updated his previous evaluation of the pro-rata request and concluded that an "...extension of approximately 50% of the pro-rata calculation would better approximate the real impact to the schedule. This would amount to a time extension of approximately 50 days due to the poor soil conditions." In that memorandum, Mr. Klenk pointed out there were poor soil conditions at the site of this project which resulted in three million nine hundred thousand dollars ($3,900,000.00) in cost over-runs.[7] (EX 65.) Therefore, using the figures generally agreed to by the State for awarding additional days to avoid the disincentive, would yield one hundred eighty-four point zero nine (184.09) [137 + 47.09] days total. Using that figure to extend the incentive date, results in an incentive bonus one million eight hundred forty thousand nine hundred dollars ($1,840,900.00). On the other hand, using RBCC's computations, would add three hundred eight (308) days to the completion date, easily qualifying it for the entire bonus obtained by multiplying ten thousand dollars ($10,000.00) per day by two hundred fifty (250) days.

These computations in and of themselves illustrate the difficulty encountered by both parties when utilizing a delay/quantity over-run method to extend a completion date to qualify a

[7] Mr. Klenk's calculation in this case is somewhat in error. Dividing three million nine hundred thousand dollars ($3,900,000.00) in cost over-runs for soil conditions by the daily rate on the contract of forty-one thousand four hundred eleven and 40/100 dollars ($41,411.40) actually yields 47.09 days of additional time.

contractor for a possible bonus or to avoid a possibly disastrous and unlimited disincentive. The impreciseness of this method has now been jettisoned by TDOT which is using new methods to determine if a bonus has been earned.

In this case, the Commission FINDS the painstaking proof put on by RBCC easily establishes that a combination of delay days and quantity over-run days results in an extension of at least two hundred fifty (250) days to be added to the original contract completion date of December 15, 2006, thereby qualifying it for the bonus of two million five hundred thousand dollars ($2,500,000.00).

Qualification of RBCC for this bonus negates the justification for disincentives and liquated damages in the amount of one hundred ninety-three thousand eight hundred dollars ($193,800.00) which were assessed by the State. These disincentives and liquidated damages are therefore ORDERED repaid to the Claimant.

Finally, RBCC argues that the Commission should order the State to immediately release to RBCC one million three hundred forty-nine thousand six hundred thirty-nine and 94/100 dollars ($1,349,639.94) in retainage. There is simply insufficient proof in this record to warrant an Order directing the State to immediately pay RBCC those monies. The facts underlying this retention by the State have not been presented to the Commission and therefore, the undersigned is extremely hesitant to make a decision in that regard.

The Commission would note that at the time of trial the amount of retainage still being withheld by TDOT was one million three hundred forty-nine thousand six hundred thirty-nine and 94/100 dollars ($1,349,639.94). However, the Claimant advised the Commission that on or about March 20, 2009, the amount of retainage has been reduced by one-half or to the amount of six hundred seventy-four thousand three hundred seventy-one and 54/100 dollars ($674,371.54).

Likewise, the relatively small eighty-five thousand six hundred thirty-seven and 36/100 dollars ($85,637.36) claim set out in Exhibit 95 regarding unpaid supplemental agreements, for asphalt and a collision device, was discussed briefly during the trial of this matter. However, although there does not appear to be an extreme dispute between the Parties regarding these figures, again there is simply insufficient proof before the Commission now for the undersigned to make an award, based on this record, in favor of RBCC for those items.

Conclusion.

The Claimant is directed to prepare a FINAL JUDGMENT consistent with this Decision which may be incorporated therein by reference.

Finally, the Commission would like to add the following observation to this Decision. This case was tried in an extremely competent fashion by the attorneys for both parties. The trial extended over a three and one-half day period and on some of those days, the session extended past normal business hours. As the record reveals, the proof in this case was extensive. Both parties displayed complete professionalism in the way they presented their proof and in the manner in which they dealt with each other. This conduct during this trial was welcomed by the Commission and both parties are due compliments for their performance in presenting their respective positions to the Commission.

ENTERED this the 2nd day of June, 2009.

William O. Shults, Commissioner
P.O. Box 960
Newport, TN 37822-0960

CERTIFICATE

I certify that a true and exact copy of the foregoing Order has been forwarded to:

Gregory L. Cashion, Esq.
Matthew J. Devries, Esq.
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231 3rd Avenue North
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Melissa Moreau, Esq.
David Coenen, Esq.
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This the 6 day of June, 2009.

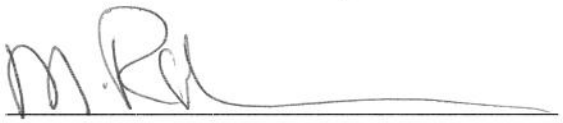

Exhibit A To Decision

ORIGINAL CONTRACTS
(Tendered into Evidence)

Exhibit No.	Project and Total $ Amount of Project (if known)	Date of Contract and Initial Proposed Completion Date (if known)	Date of Approval of Extended Completion Date	Incentive/ Disincentive Language in contract	Extended to Date	Incentive Paid or Not
66	RobertsonRoad/Briley Parkway Project $43,612,000.00	11/4/02 – 11/1/05	3/13/06	Yes	4/26/06	Yes
67	Knox County Project	2/25/05 No Excuse Bonus	N/A*	N/A	N/A	N/A
68	Jefferson County Project	9/10/08 No Excuse Bonus	N/A	N/A	N/A	N/A
69	Davidson County Project	9/30/05 A+B Bonus Method	N/A	N/A	N/A	N/A
70	Davidson County Project	11/17/00	Unknown	Different Language	Unknown	Unknown
71	Davidson County Project	1/8/02	Unknown	Different Language	Unknown	Unknown
72	(See Exhibit 66 above)					

* N/A = Inapplicable

Exhibit A To Decision

ORIGINAL CONTRACTS
(Tendered into Evidence)

73	Davidson County Project	11/17/03	Unknown	No Bonus if not complete by 5/31/07	Unknown	Unknown
74	Rutherford County Project	11/17/03		No Bonus unless complete by 10/31/05	Unknown	Unknown
Exhibit No.	**Project and Total $ Amount of Project (if known)**	**Date of Contract and Initial Proposed Completion Date (if known)**	**Date of Approval of Extended Completion Date**	**Incentive/ Disincentive Language in contract**	**Extended to Date**	**Incentive Paid or Not**
75	Rutherford County Project	11/17/03	Unknown	Same language	Unknown	Unknown
76	Knox County Project	11/23/99	Unknown	Different Language	Unknown	Unknown
77	Shelby County Project	10/13/00	Unknown	Different Language	Unknown	Unknown
78	Hamilton County Project	10/1/01	Unknown	No Bonus unless complete by 11/15/04	Unknown	Unknown
79	Hamilton County Project	4/15/04	Unknown	Different Language	Unknown	Unknown

* N/A = Inapplicable

Exhibit A To Decision

SUPPLEMENTAL AGREEMENTS
(Tendered into Evidence)

Exhibit No.	Project and Total Amount	Date of Contract - - Initial Completion Date	Date Supplemental Agreement approved	Incentive/Disincentive Language in Contract	Terms of SA	Completion Date Extended to	Incentive Paid
80	Knox County (Blalock 640 Project) $17,287,000.00	1/13/00	4/28/06	Unknown	No language prohibiting ext. of incentive date under SP 108B	179 days to 2/25/04	No language indicating whether any bonus was paid
82	Weakley County Project $354,633.00	1/6/03	6/3/04	No	Extended based on delays and pro-rata method. $30,569.95 paid	2/9/04	Unknown
83	Robertson Road/Briley Parkway Project – (See Exhibit 66 Above)				Extended based on delays and pro-rata method. $2,359,006.12 paid		
84	Davidson County project $308,219.23	6/24/03	10/31/05	Unknown	Extended based on delays and pro-rata method. $62,884.00 paid	Yes, 225 days up to 6/9/04	Unknown
85	Knox County Project (Renfro) $5,249,281.87	9/24/01	10/21/05	Unknown.	Extended based on delays and pro-rata method. $407,633.00 paid	718 days to 7/1/05	Unknown
86	Lewis County Project $7,542,958.06	10/2/00	1/12/06	Unknown	Extended based on delays. $1,476,057.00 paid	858 days to 5/5/05	Unknown
87	Maury County Project $13,096,910.79	8/29/00	3/14/05	Unknown	Extended based on delays and pro-rata method. $1,433,586.11 paid	From 11/29/02 to 4/30/04	Unknown

Exhibit A To Decision

SUPPLEMENTAL AGREEMENTS
(Tendered into Evidence)

Exhibit No.	Project and Total Amount	Date of Contract - - Initial Completion Date	Date Supplemental Agreement approved	Incentive/Disincentive Language in Contract	Terms of SA	Completion Date Extended to	Incentive Paid
88	Lauderdale County Project $1,079,120.70	7/17/01	2/6/03	Unknown	No liquidated damages assessed; deduction of $121,394.78 – based on delays.	From 11/01 to 7/1/02	Unknown
89	Davidson County Project $36,017,006.56	10/20/02 or 12/20/02	Unknown	Different language	Over-runs and pro-rata method used. $1,042,167.32 paid	From 10/1/05 to 11/17/05	Unknown
90	Davidson County Project $2,217,532.95	4/7/03	4/24/06	Unknown	Delays used to award $227,420.20	136 days; from 8/15/03 to 12/29/03	Unknown
91	Washington County $968,891.16	12/27/01	5/1/06	Unknown	Extended based on delays and pro-rata method $718.75 paid additional	431 days; from 8/02 to 10/18/03	Unknown